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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1192

FOREST E. OLSON, INC. and COLDWELL, BANKER AND CO.,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Brief of the Attorney General of the State of California on behalf of Respondent in Opposition to the Petition for Writ of Certiorari.

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Brief of the Attorney General of the State of California on Behalf of Respondent in Opposition to the Petition for Writ of Certiorari.

The Attorney General of the State of California appears before this Court as *amicus curiae* in opposition to the petition of certiorari filed by petitioners Forest E. Olson, Inc. and Coldwell, Banker and Co. Petitioners seek review of a writ of mandate issued by the California Court of Appeal[1] requiring the trial court to vacate its ruling that California's false advertising laws are unconstitutional because they authorize the imposition of civil monetary and criminal sanctions for the negligent dissemination of untrue or misleading advertising. The Supreme Court of California denied a petition for hearing.

[1]The opinion is printed *sub nomine People of the State of California v. Superior Court* (*Olson*), 96 Cal.App.3d 181, 157 Cal.Rptr. 628 (1979) and is appended to the Petition for Certiorari.

I.

QUESTION PRESENTED.

The question presented by petitioners is whether the imposition of a civil monetary or criminal penalty for the negligent dissemination of false or misleading advertising creates a constitutionally impermissible chilling effect on the exercise of purely commercial speech. Petitioners contend that the First Amendment, as interpreted by this Court in *New York Times v. Sullivan,* 376 U.S. 254 (1964) mandates that only false and misleading advertising disseminated with malice, *i.e.* with knowledge or with reckless disregard of the advertising's false or misleading character, may be constitutionally subject to sanction.

II.

REASON FOR DENYING THE WRIT.

THE CALIFORNIA COURT OF APPEAL PROPERLY CONSIDERED AND CORRECTLY APPLIED PRIOR DECISIONS OF THIS COURT WHICH CLEARLY DISPOSE OF THE QUESTION PRESENTED.

A. False or Misleading Advertising Is Clearly Not Protected From Regulation by the First Amendment.

In concluding that commercial speech was entitled to some First Amendment protection, this Court recognized that such speech furthers "the societal interest in 'the free flow of commercial information' " which is necessary to maintain the vitality of a free and open market economy. *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 783 (1978). *See Friedman v. Rogers,* 440 U.S. 1, 8-9 (1979); *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 92 (1977); *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748, 765 (1976).

This Court, however, explicitly acknowledged that commercial speech which is false or misleading corrupts the flow of commercial information and vitiates the ability of the public to make intelligent, well informed economic decisions. As the Supreme Court has noted,

> "the public and private benefits from commercial speech derive from confidence in its accuracy and reliability." *Bates v. State Bar of Arizona,* 433 U.S. 350, 383 (1977).

Accordingly, the Court emphasized that:

> "Untruthful speech, commercial or otherwise, has never been protected for its own sake. [Citations omitted.] Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee *no obstacle* to a State's

dealing effectively with this problem. [Footnote omitted.] *The First Amendment*, as we construe it today, *does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.*'' *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. at 771-72. (Emphasis added.)

Accord Friedman v. Rogers, supra, 440 U.S. at 9.

Accordingly, this Court has held that:

> ''Advertising that is false, deceptive, or misleading *of course* is subject to restraint.'' *Bates v. State Bar of Arizona*, 433 U.S. at 383. (Emphasis added.)

This Court has even upheld restrictions on commercial speech which in fact was not misleading but whose use ''enhances the opportunity for misleading practices.'' *Friedman v. Rogers, supra*, 440 U.S. 1, 15.

B. Commercial Speech Will Not Be Impermissibly Chilled by the State's Prohibition on All False and Misleading Statements.

Notwithstanding the unmistakable exclusion under the decisions of this Court of false or misleading statements from the realm of First Amendment protection, petitioners contend that the possibility that penalties may be imposed for negligently published false and misleading advertising will dissuade advertisers from exercising their right to commercial speech and that, therefore, this Court's ruling in *New York Times v. Sullivan, supra*, requires the State to tolerate negligently disseminated false or misleading advertising to avoid chilling advertisers from engaging in their First Amendment right to commercial speech. Petitioners' contention is predicated on two erroneous assumptions: that commercial speech dwells on the same plateau of protection as all other protected speech and that the rationale of the protection established in *New York Times* for speech on

public, social, and political issues is applicable to speech that ''does 'no more than propose a commercial transaction.' '' *Virginia Pharmacy Board v. Virginia Consumer Council, supra*, 425 U.S. 748, 771 n. 24. These assumptions have been rejected by the decisions of this Court and by the California Court of Appeal in properly applying those decisions.

1. Commercial Speech Is Not Accorded Equivalent Protection to Other Forms of Speech.

In acknowledging that commercial speech is entitled to some First Amendment protection, this Court never established that commercial speech is entitled to the same panoply of protections afforded to other forms of speech:

> ''In rejecting the notion that such speech 'is wholly outside the protection of the First Amendment,' *Virginia Pharmacy, supra*, at 761, we were careful not to hold 'that it is wholly undifferentiable from other forms' of speech. 425 U.S., at 771 n. 24. We have not discarded the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* . . . [W]e instead have afforded commercial speech a *limited measure of protection*, commensurate with its *subordinate position in the scale of First Amendment values*, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.'' *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-56 (1978). (Emphasis added.)

Indeed, this Court has held that:

> ''Because of the special character of commercial speech and the relative novelty of First Amendment protection for such speech, we act with caution in con-

fronting First Amendment challenges to economic legislation that serves legitimate regulatory interests. *Our decisions dealing with more traditional First Amendment problems do not extend automatically to this as yet uncharted area*. [citation] (overbreadth analysis not applicable to commercial speech). When dealing with restrictions on commercial speech we *frame our decisions narrowly*, 'allowing modes of regulation [of commercial speech] that might be impermissible in the realm of non-commercial expression.' " *Friedman v. Rogers, supra*, 440 U.S. 1, 10-11 n.9. (Emphasis added.)

Thus, the doctrine of *New York Times* does not perforce extend to the arena of commercial speech merely because that speech has limited Constitutional protection. Moreover, the decisions of this Court have already recognized the "commonsense" differences between advertising and traditional forms of protected speech which militate against the application of *New York Times* to commercial speech.

2. The Rationale of New York Times v. Sullivan Is Inapplicable to Commercial Speech.

The case of *New York Times v. Sullivan, supra*, involved a paid political advertisement concerning the civil rights struggle in the South and the defense of Dr. Martin Luther King. The advertisement was assailed under the Alabama libel law, and the case was considered "against the background of a profound national commitment" to vigorous, unrestrained public debate which might result in vitriolic attacks on public officials. 376 U.S. at 270. The Court held that state libel laws protect public figures and holders of governmental office from defamatory falsehoods only to the extent that the falsehoods were uttered with knowledge of their falsity or reckless disregard of their truth. *Id.* at 280-81.

The Court reasoned that, within the context of spirited and open political criticism, an

> "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive. . . .' " *Id.* at 271-72.

Consequently, the Court extended protection to negligently made false statements not because of their merit but because the self-censorship resulting from the fear of liability for such "inevitably" made negligent false political statements would intolerably constrict the free flow of public debate and criticism of public figures. *Id.* at 279.

Nonetheless, this Court has never held that *New York Times* is an iron rule applicable in all instances of traditionally protected speech or even in all instances of defamation. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). (*New York Times* malice standard not applicable in case of defamation of private individual). Indeed, decisions of this Court have clearly indicated that the prohibition on false or misleading advertising does not chill the exercise of commercial speech.

In *Virginia Pharmacy Board*, this Court declared:

> "commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, *there is little likelihood of its being chilled by proper regulation and forgone entirely*.
>
> "Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker." *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. at 771 n. 24.

See Friedman v. Rogers, supra, 440 U.S. at 410.

In his concurring opinion to *Virginia Pharmacy Board*, cited approvingly in *Young v. American Mini Theatres*, 427 U.S. 50, 69 n. 32 (1976) and again in *Friedman v. Rogers*, 440 U.S. at 410, Mr. Justice Stewart specifically focused on the significant difference between commercial and ideological speech. He remarked that the reasoning in the libel cases actually indicates that control of untrue advertising claims is proper:

> "The principles recognized in the libel decisions suggest that government may take broader action to protect the public from injury produced by false or deceptive price or product advertising than from harm caused by defamation. In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. *The advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression. There is, therefore, little need to sanction 'some falsehood in order to protect speech that matters.'* " 425 U.S. at 777-78 (Emphasis added.)

Justice Stewart concluded that:

> "Indeed, the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking." *Id.* at 781.

Accord Friedman v. Rogers, supra. See National Commission on Egg Nutrition v. FTC, 570 F.2d 157, 161-63 (7th Cir. 1977), *cert. den.* (1978) 99 S.Ct. 86 in which the Court of Appeals rejected the application of *New York Times* to commercial advertising.)

This viewpoint was reiterated in *Bates v. State Bar of Arizona, supra,* in which the Court declared that state regulation of false or misleading statements would not chill the exercise of calculated commercial advertising. The Court stated:

> ". . . Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech. [citations omitted] And any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for *untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena.*" 433 U.S. at 383. (Emphasis added.)

Accord Friedman v. Rogers, 440 United States at 409-10. As the Court ruled long ago,

> "It is not difficult to choose statements, designs, and devices which will not deceive." *United States v. 95 Barrels, More or Less, Alleged Apple Cider Vinegar*, 265 U.S. 438, 443 (1924).

In short, "There is no constitutional right to disseminate false or misleading statements." (*E.F. Drew & Co. v. FTC*, 235 F.2d 735, 740 (2d Cir. 1956), *cert. den.*, 352 U.S. 969

(1957) (case cited approvingly in *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. at 771 n. 24).)

Consequently, this Court gave specific approval to a Virginia *strict liability statute* (Va. Code Ann. § 18.2-216)[2] prohibiting the dissemination of false or misleading

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[2]Va. Code Ann. § 18.2-216 provides:

"Any person, firm, corporation or association who, with intent to sell or in anywise dispose of merchandise, securities, service or anything offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or any interest therein, makes, publishes, disseminates, circulates or places before the public, or causes, directly or indirectly to be made, published, disseminated, circulated or placed before the public, in a newspaper or other publications, or in the form of a book, notice, handbill, poster, blueprint, map, bill, tag, label, circular, pamphlet or letter or in any other way, an advertisement of any sort regarding merchandise, securities, service, land, lot or anything so offered to the public, which advertisement contains any promise, assertion, representation or statement of fact which is untrue, deceptive or misleading, or uses any other method, device or practice which is fraudulent, deceptive or misleading to induce the public to enter into any obligation, shall be guilty of a Class 1 misdeameanor. The words 'untrue, deceptive and misleading,' as used in this section, shall be construed as including (i) the advertising in any manner by any person of any goods, wares or merchandise as a bankrupt stock, receiver's stock or trustee's stock, if such stock contains any goods, wares or merchandise put therein subsequent to the date of the purchase by such advertiser of such stock, and if such advertisement of any such stock fail to set forth the fact that such stock contains other goods, wares or merchandise put therein, subsequent to the date of the purchase by such advertiser of such stock in type as large as the type used in any other part of such advertisement, including the caption of the same, it shall be a violation of this section; and (ii) the use of any writing or document which appears to be, but is not in fact a negotiable check, negotiable draft or other negotiable instrument notwithstanding the fact that its nonnegotiability is indicated on the writing or document."

The statute provides that its violation is a misdemeanor which is punishable by up to 1 year in jail and $1,000 per violation. (*See* Va. Code Ann. § 18.2-11(a).) The Virginia statutory scheme also provides for injunctive relief in actions brought by public prosecutors and creates private remedies for damages and attorney's fees. (Va. Code Ann. § 59.1-68.2-§ 59.1-68.5.)

advertising. *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. at 772. Moreover, the Court has declared that the well established authority of the Federal Trade Commission to prohibit false and misleading statements regardless of the intent of the disseminator (*see, e.g., FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934)) remains unimpaired by the recognition of a limited constitutional protection for commercial speech. (*See Young v. American Mini Theatres*, 427 U.S. at 68 n. 31; *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. at 771 n. 24.)

Since the state may fully regulate the dissemination of false or misleading advertising because it is not protected by the First Amendment either directly or indirectly to prevent the chilling of the exercise of otherwise protected commercial speech, the state legislature may reasonably select the means by which the proscribed conduct is to be punished. *See, e.g., Warden v. Marrero*, 417 U.S. 653, 664 (1974); *Arroyo v. United States*, 359 U.S. 419, 424 (1959); *Weems v. United States*, 217 U.S. 349, 379 (1910); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Petitioners have not and cannot demonstrate the impropriety of the civil penalty or misdemeanor sanction to the offense of false advertising.

Conclusion.

The Petition for a Writ of Certiorari contains no issue that has not been considered by this Court in its seminal cases on commercial speech. The California Court of Appeal properly applied the law as interpreted by this Court. No conflicting authorities have been mentioned by petitioners to question the correctness of the Court of Appeal's ruling. Moreover, petitioners have failed to demonstrate how this Court's consideration of this case will in any way develop

or elucidate clear principles established in *Friedman, Bates,* and *Virginia Pharmacy Board*. Accordingly, amicus respectfully contends that no issue in this case is sufficiently novel or significant to warrant this Court's exercise of its discretionary jurisdiction by granting the writ.

Respectfully submitted,

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